ORIGINAL

(3)

No. 96-6839

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

HUGO ROMAN ALMENDAREZ-TORRES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Section 1326 of Title 8 of the United States Code imposes criminal penalties on deported aliens who reenter the country illegally. Section 1326(a) provides for a maximum prison term of two years for violation of the statute, subject to the provisions of subsection (b). Section 1326(b) provides for enhanced maximum terms for violators whose previous deportation followed a felony conviction or three misdemeanor convictions for specified offenses. The question presented is:

Whether Section 1326(b) defines an offense separate from that defined in Section 1326(a), so that an alien defendant's previous conviction or convictions must be alleged in the indictment and proved at trial before an enhanced sentence may be imposed.

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OPINION BELOW

The decision of the court of appeals (Pet. App. A) is unpublished, but the judgment is noted at 96 F.3d 1443 (Table).

JURISDICTION

The judgment of the court of appeals was entered on August 22, 1996. The petition for a writ of certiorari was filed on November 20, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Northern District of Texas, petitioner was convicted of illegally reentering the United States as a deported alien, in

violation of 8 U.S.C. 1326. He was sentenced to 85 months' imprisonment. The court of appeals affirmed. Pet. App. A.

1. In 1991, petitioner, a citizen of Mexico, was convicted on three separate occasions in Texas state courts of burglary of a habitation. He was thereafter deported from the United States on April 18, 1992. In June 1992 petitioner illegally returned to the United States by crossing the Rio Grande River near Laredo, Texas. On July 28, 1995, an agent of the United States Border Patrol found petitioner at a jail in Tarrant County, Texas, where petitioner was incarcerated on unrelated charges. Petitioner had not obtained permission from the Attorney General to reenter the United States. Gov't C.A. Br. 4-5.

Petitioner subsequently pleaded guilty to being found unlawfully in the United States on July 28, 1995, after having been previously arrested and deported, in violation of 8 U.S.C. 1326. Section 1326(a) provides for a maximum prison term of two years for a violation of the statute, subject to the provisions of subsection (b). Section 1326(b)(1) provides for a maximum term of 10 years' imprisonment of offenders whose deportation follows a felony conviction (other than a conviction for an "aggravated felony") or three misdemeanor convictions for specified offenses. Section 1326(b)(2) provides for a maximum term of 20 years' imprisonment of offenders whose deportation follows a conviction for an "aggravated felony," as defined in 8

U.S.C. 1101(a)(43).[1] Because petitioner had been convicted of aggravated felonies before his deportation (his three 1991 Texas burglary convictions), the district court sentenced him pursuant to Section 1326(b)(2) to a term of 85 months' imprisonment.

2. The court of appeals affirmed. Pet. App. A. Relying on its earlier opinion in United States v. Vasquez-Olvera, 999 F.2d 943 (5th Cir. 1993), cert. denied, 510 U.S. 1076 (1994), the court rejected petitioner's claim that the imposition of sentence pursuant to Section 1326(b)(2) was unlawful because his prior aggravated felony convictions had not been alleged in the indictment. Vasquez-Olvera had held that because Section 1326(b)(2) provides only for sentencing enhancement, and does not establish a separate offense, the indictment need not contain an allegation that the defendant committed a felony before his deportation. 999 F.2d at 945-946.

ARGUMENT

Petitioner contends that Sections 1326(a) and 1326(b) create separate offenses, and that the imposition of sentence under the higher maximum penalty provisions of Section 1326(b) was unlawful because the indictment did not allege his prior aggravated felony convictions as an element of the offense. That claim is

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[1] After petitioner's offense, Congress amended Section 1326 on two occasions, but the changes effected by those amendments are not relevant to the disposition of this case. See Pub. L. No. 104-132, Title IV, §§ 401(c), 438(b), 441(a), 110 Stat. 1267, 1276, 1279 (April 24, 1996); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, Title III §§ 308(d)(4)(J), 324, 110 Stat. 1570, 1685, 1704 (September 30, 1996).

incorrect and does not merit review by this Court. The Court has previously denied petitions for certiorari in at least twelve cases raising the same issue,[2] and there is no reason for a different result here.

1. Subsection (a) of 8 U.S.C. 1326 provides that "[s]ubject to subsection (b) of this section," any previously arrested and deported alien who reenters or is found in the United States without specific permission (or without demonstrating that such permission was not required) shall be subject to a fine and to imprisonment "of not more than two years." Subsection (b) provides that "[n]otwithstanding subsection (a) of this section, in the case of any alien described in such subsection" whose previous deportation followed a felony conviction, or three misdemeanor convictions for specified offenses, the maximum term of imprisonment shall be 10 or 20 years, depending on whether the

[2] See Collado v. United States, cert. denied, 116 S. Ct. 1572 (1996); Velasquez-Velasquez v. United States, cert. denied, 116 S. Ct. 928 (1996); Palacios-Casquete v. United States, 116 S. Ct. 927 (1996); Rijo-Montas v. United States, 116 S. Ct. 89 (1995); Cole v. United States, 115 S. Ct. 497 (1994); Crawford v. United States, 115 S. Ct. 171 (1994); Ponce-Santoyo v. United States, 115 S. Ct. 122 (1994); Rivas-Gaytan v. United States, 114 S. Ct. 2142 (1994); Hernandez v. United States, 114 S. Ct. 2141 (1994); Trevizo-Ortiz v. United States, 114 S. Ct. 2141 (1994); Valenzuela-Lopez v. United States, 114 S. Ct. 2140 (1994); Vasquez-Olvera v. United States, 510 U.S. 1076 (1994).

alien had been convicted of an "aggravated felony."[3] The term "aggravated felony" is defined in 8 U.S.C. 1101(a)(43).

[3] At the time of petitioner's offense, Section 1326 provided as follows:

> Reentry of deported alien; criminal penalties for reentry of certain deported aliens
>
> (a) Subject to subsection (b) of this section, any alien who--
>
> (1) has been arrested and deported or excluded and deported, and thereafter
>
> (2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously excluded and deported, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,
>
> shall be fined under Title 18, or imprisoned not more than 2 years, or both.
>
> (b) Notwithstanding subsection (a) of this section, in the case of any alien described in such subsection--
>
> (1) whose deportation was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony), such alien shall be fined under Title 18, imprisoned not more than 10 years, or both; or
>
> (2) whose deportation was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such Title, imprisoned not more than 20 years, or both.
>
> For the purposes of this subsection, the term "deportation" includes any agreement in which the alien stipulates to deportation during a criminal trial under either Federal or State law.

Nothing in the wording of the statute suggests that subsection (b) creates an offense separate from that described in subsection (a).[4] Section 1326 describes one offense with three possible maximum sentences. The elements of the offense -- arrest or exclusion, deportation, reentry into the United States, and lack of advance consent or of proof that such consent was unnecessary -- are all set forth in subsection (a), and not in subsection (b). The maximum penalties generally applicable to aliens found to have violated the elements in subsection (a) are set forth in that subsection, except that the subsection (a) maximum penalty is "[s]ubject to subsection (b)," providing for higher penalties in limited circumstances. Subsection (b) prescribes additional sentences that may be imposed, "[n]otwithstanding subsection (a)," where the defendant was convicted, before deportation, of a felony. Section 1326 is thus structured as an offense with a generally applicable maximum penalty, followed by a penalty enhancement provision.

Further, as the court of appeals observed in Vasquez-Olvera, the title of Section 1326 supports the conclusion that Section 1326(b) is a penalty enhancement provision. 999 F.2d at 945 & n.4; see INS v. National Ctr. for Immigrants' Rights, 502 U.S. 183, 189 (1991) (title of statute may be considered in discerning meaning of statute). Before subsection (b) was added, Section 1326 was titled "Reentry of deported alien." See 8 U.S.C. 1326

[4] Section 1326(b), and the introductory clause of Section 1326(a), were added to the statute by the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, Tit. VII, § 7345(a), 102 Stat. 4471.

(1982). The 1988 amendment that added the enhanced sentencing provisions appended the following phrase to the title: "--criminal penalties for reentry of certain deported aliens." See 8 U.S.C. 1326 (1988 & Supp. V 1993); Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, Tit. VII, § 7345(a), 102 Stat. 4471. That appended phrase, like the introductory cross-references to each of the new subsections in the statute itself, suggests that the amendment was intended to modify "penalties" for "certain" violations of the existing statute, not to create a new and separate crime.[5]

The penalty provisions of Section 1326(b) are comparable to those of 21 U.S.C. 841(b), which specifies graduated penalties for violations of Section 841(a)'s prohibitions on possession or distribution of controlled substances, depending on the type and amount of the substance involved and on the defendant's history of prior convictions. United States v. Cole, 32 F.3d 16, 18-19 (2d Cir.), cert. denied, 115 S. Ct. 497 (1994). The Second

[5] No Senate or House committee report was submitted with the lengthy final legislation that included the 1988 amendment. See 1988 U.S. Code Cong. & Admin. News 5937. Nor does there appear to have been floor debate concerning the amendment to Section 1326. The sponsor of an earlier House bill (H.R. 3530, 100th Cong., 1st. Sess. (1987)) that contained language substantially similar to the language finally adopted stated that the proposed amendment "would impose stricter criminal penalties upon aliens who re-enter the United States after being deported. Existing law includes a penalty of up to 2 years in prison and/or a $2,000 fine for any deported alien who re-enters the United States. My bill adds two additional tiers of penalties." 133 Cong. Rec. 28,840-28,841 (1987) (remarks of Rep. Smith). The sponsor of an identical Senate bill (S. 973, 100th Cong., 1st. Sess. (1987)) made a similar introductory statement. 133 Cong. Rec. 8772 (1987) (remarks of Sen. Chiles).

Circuit in Cole held that the factors specified in Section 1326(b), like those in Section 841(b), could properly be taken into account at sentencing even though not specifically charged or proved at trial. 32 F.3d at 19.

The First Circuit has reached the same conclusion, although on different grounds. The court in United States v. Forbes, 16 F.3d 1294 (1st Cir. 1994), held that the language and structure of Section 1326 are ambiguous, id. at 1298, but construed the statute in light of the longstanding practice that a defendant's prior felony convictions are generally background information to be considered by the judge at sentencing, rather than elements to be proved to the trier of fact. Id. at 1299 (citing Gov't of Virgin Islands v. Castillo, 550 F.2d 850, 853 n.5, 854 (3d Cir. 1977)); see also, e.g., United States v. Lowe, 860 F.2d 1370, 1377-1378 (7th Cir. 1988), cert. denied, 490 U.S. 1005 (1989). Moreover, the court noted that the existence of a prior conviction is usually not disputed, and could be prejudicial to the defendant if revealed to the jury. Forbes, 16 F.3d at 1299-1300. For these and similar reasons, the courts of appeals have generally concluded that prior convictions used to enhance sentences are not elements of the underlying crime. See United States v. Dunn, 946 F.2d 615, 619-620 (9th Cir.), cert. denied, 502 U.S. 950 (1991); United States v. Affleck, 861 F.2d 97 (5th Cir. 1988), cert. denied, 489 U.S. 1058 (1989); United States v. Kinsey, 843 F.2d 383, 390-392 (9th Cir.), cert. denied, 487 U.S. 1223 and 488 U.S. 836 (1988); United States v. Jackson, 891 F.2d

1151, 1152-1153 (5th Cir. 1989), cert. denied, 496 U.S. 939 (1990).

Because a prior felony conviction is not an element of the offense under Section 1326, petitioner errs in relying (Pet. 7) on the principle that the prosecution is required to prove every element of the crime beyond a reasonable doubt. See, e.g., In Re Winship, 397 U.S. 358, 364 (1970). Nor does McMillan v. Pennsylvania, 477 U.S. 79 (1986), aid petitioner's claim. McMillan makes clear that a legislature's definition of the elements of the offense is usually dispositive. 477 U.S. at 85. The Court accordingly held that a provision of Pennsylvania's Mandatory Minimum Sentencing Act, which provided a mandatory minimum sentence if the defendant visibly possessed a firearm during the commission of certain felonies, could constitutionally be treated as a sentencing consideration rather than as an element of a particular offense. The possibility that a sentencing enhancement factor may significantly increase the sentence does not compel the conclusion that the factor must be treated as an element of the offense. See United States v. Trujillo, 959 F.2d 1377, 1381 (7th Cir.) (quantity of drugs is a sentencing issue, not an element of 21 U.S.C. 841 offense), cert. denied, 506 U.S. 897 (1992). That is particularly true where the factor at issue is the easily verifiable existence of a prior conviction, which has traditionally been a matter taken into

consideration at sentencing.[6] See McMillan, 477 U.S. at 92-93 (citing with approval United States v. Davis, 710 F.2d 104, 106 (3d Cir.) (upholding constitutionality of substantial sentence enhancement under 18 U.S.C. 3575 for "dangerous special offenders" based in part on prior convictions), cert. denied, 464 F.2d 1001 (1983)); United States v. McGatha, 891 F.2d 1520, 1525-1527 (11th Cir.), cert. denied, 495 U.S. 938 (1990); United States v. Lowe, 860 F.2d at 1377-1381.

2. The court of appeals' holding accords with decisions of the First, Second, Third, Fourth, Seventh, Eighth, Tenth, and Eleventh Circuits, as well as with a decision of the Fifth Circuit predating its decision in this case. See, e.g., Forbes, 16 F.3d at 1297-1300 (1st Cir.); Cole, 32 F.3d at 18 (2d Cir.); United States v. DeLeon-Rodriguez, 70 F.3d 764, 765-767 (3d Cir. 1995), cert. denied, 116 S. Ct. 1343 (1996); United States v. Crawford, 18 F.3d 1173, 1176-1178 (4th Cir.), cert. denied, 115 S. Ct. 171 (1994); United States v. Vasquez-Olvera, 999 F.2d 943, 944-947 (5th Cir. 1993), cert. denied, 510 U.S. 1076 (1994); United States v. Munoz-Cerna, 47 F.3d 207, 210 n.6 (7th Cir. 1995); United States v. Haggerty, 85 F.3d 403, 404-405 (8th Cir. 1996); United States v. Valdez, 1996 WL 742321 (10th Cir., Dec. 31, 1996); United States v. Palacios-Casquete, 55 F.3d 557, 559-560 (11th Cir. 1995), cert. denied, 116 S. Ct. 927 (1996).

[6] Indeed, although his prior burglary convictions were not included in the indictment as an element of the offense, petitioner admitted as part of the factual basis for his guilty plea that he had in fact been convicted of the three burglary offenses that were the basis for enhancement of his sentence pursuant to Section 1326(b)(2). Gov't C.A. Br. 4; Pet. 3. Accordingly, there was no disputed issue of fact relating to those prior offenses.

As petitioner points out (Pet. 6), the Ninth Circuit has adopted the interpretation of Section 1326 that he advances in this case. See, e.g., United States v. Campos-Martinez, 976 F.2d 589, 590-592 (9th Cir. 1992). The conflict, however, is of limited legal or practical importance. Because proof of prior convictions is normally quite simple and not subject to dispute, the requirement in the Ninth Circuit that the government allege such convictions in an indictment or information and prove them at trial, rather than at sentencing, has not contributed significantly to the difficulty of trying cases under Section 1326(b) in that circuit, and is unlikely to do so in the future. Nor, providing that prosecutors comply with that circuit's requirement of alleging such convictions and proving them at trial, is that requirement likely to have any effect on the outcome of cases brought in the Ninth Circuit as compared with cases in other circuits. Accordingly, the conflict among the courts of appeals on the question presented in this case does not merit resolution by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1997

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ALMENDAREZ-TORRES, HUGO ROMAN Petitioner	)	
vs.	)	No. 96-6839
USA	)	

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the **BRIEF FOR THE UNITED STATES IN OPPOSITION** by first class mail, postage prepaid, on this 20th day of February 1997.

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February 20, 1997